Office-Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-534

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

SAMUEL CLYDE MORRELL,
an Incompetent Person,
by his COMMITTEE,
HENRY CLYDE MORRELL,

Petitioner,

v.

DUKE UNIVERSITY, et al.,

Respondents.

-and-

SAMUEL CLYDE MORRELL,
an Incompetent Person,
by his COMMITTEE,
HENRY CLYDE MORRELL,

Petitioner,

v.

DR. HOWARD E. STRAWCUTTER, et al.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LIST OF PARTIES TO THE PROCEEDING

Samuel Clyde Morrell, an incompetent person, is represented in this action by his Committee, Henry Clyde Morrell.

Duke University, a North Carolina Corporation, David F. Paulson, M.D. and Michael J. Moran, M.D. are herein sometimes referred to as the "Duke defendants." Duke University Medical Center and Duke Hospital have no independent corporate existence. Duke University does not have a parent company nor does it have any subsidiary or affiliate; a Disclosure Of Corporate Affiliations And Financial Interest was executed and filed of record in the United States Court Of Appeals for The Fourth Circiut pursuant to Local Rule 17 of the United States Court Of Appeals For The Fourth Circuit to which document reference is hereby made as permitted by Rule 28, Rules Of Supreme Court Of The United States.

Luis Gonzales-Serva, M.D. is named as a party defendant, but was never served with process in this action.

Southeastern General Hospital, Inc. is a North Carolina corporation. A settlement between Southeastern General Hospital and the Plaintiff was effected and an Order entered dismissing this action as to Southeastern General Hospital, Inc.

Warren L. Williamson, M.D. was dismissed from this action by entry of Summary Judgment in his favor.

Dr. Howard E. Strawcutter, Dr. William R. Burleson and Dr. Thomas R. Leininger, individually and as partners doing business under the common name of Urology Clinic, are herein sometimes referred to as the "Strawcutter defendants."

The Duke defendants and the Strawcutter defendants appear as Respondents to the Petition for a Writ of Certiorari.

TABLE OF CASES AND AUTHORITIES

CASES

Adickes v. Kress & Co., 398 U.S. 144 (1970).

Blue Mountain Construction Co. v. Werner, 270 F.2d 305 (9th cir. 1959), cert. denied, 361 U.S. 931 (1960).

Duigan v. United States, 274 U.S. 195 (1927).

Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d cir. 1953), cert. denied, 345 U.S. 964 (1953).

Husty v. United States, 282 U.S. 694 (1931).

Lawn v. United States, 355 U.S. 339 (1958).

Link v. Wabash R. Co., 370 U.S. 626 (1972).

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951).

United States v. Johnston, 268 U.S. 220 (1925).

Young v. Wilky Carrier Corp., 150 F.2d 764 (3d cir. 1945), cert. denied, 326 U.S. 786.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit has not been reported. It is reprinted as Appendix A to the Petition for a Writ of Certiorari.

No written Opinion was rendered in this cause by the United States District Court for the Eastern District of North Carolina.

RULES OF CIVIL PROCEDURE INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE

Rule 41(a)(1)(ii)

Rule 41(a)(2)

Rule 41(b)

Rule 51

RULES OF PRACTICE AND PROCEDURE IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Rule 26.06 (set out verbatim in Appendix E annexed hereto)

The text of Rule 41 of the Federal Rules of Civil Procedure, subsections (a) and (b), appears at pages 2-4 of the Petition. The text of Rule 51 of the Federal Rules of Civil Procedure appears at page 4 of the Petition.

SUMMARY OF REASONS FOR DENYING THE PETITION

I. ISSUES ARISING UNDER RULE 41

1. The decision in this appeal by the United States Court of Appeals for the Fourth Circuit is not in conflict with the decision of another Federal Court of Appeals on the same matter.

A. The question whether Rules 41(a)(1)(ii) and 41(a)(2) permit a plaintiff to take a voluntary dismissal against less than all of several defendants was not addressed by the Court of Appeals below.

B. The decision of the Fourth Circuit Court of Appeals to the effect that a District Court is not obliged to treat a Rule 41(a)(2) Motion for voluntary dismissal as a Rule 41(a)(1)(ii) stipulation for dismissal is not in conflict with a decision of another federal court of appeals on the same matter.

2. The Court of Appeals did not depart from the accepted and usual course of

judicial proceedings in affirming the District Court's allowance of the Duke defendants' motion for involuntary dismissal under Rule 41(b).

3. Review by Writ of Certiorari is unwarranted with respect to the issues presented under Rule 41 of the Rules of Civil Procedure upon the additional grounds that the questions presented by the Petition were correctly analysed and decided by the Court of Appeals, that the questions of Federal Law are not so important as to require resolution by the Supreme Court, and that the unusual factual background of this case makes it unlikely that similar issues will recur.

II. ISSUES ARISING UNDER RULE 51

1. The Fourth Circuit Court of Appeals gave full consideration to this issue and its decision is legally sound.

2. The issue is unlikely to recur and is too narrow to warrant review by this Court on certiorari.

* * *

DISCUSSION OF REASONS FOR DENYING THE PETITION

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED WITH RESPECT TO THE ISSUES ARISING UNDER RULE 41 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

1. The decision in this appeal by the Court of Appeals for the Fourth Circuit

is not in conflict with the decision of another federal court of appeals on the same matter.

A. The question whether F.R.Civ. P. 41(a)(1)(ii) and 41(a)(2) permit a plaintiff to take a voluntary dismissal against less then all of several defendants was not addressed by the Court of Appeals below.

The issues presented to the Fourth Circuit Court of Appeals by Petitioner (Appellant below) regarding the District Court's denial of Petitioner's Rule 41(a) Motion for voluntary dismissal were two-fold. Firstly, Petitioner argued that the District Court should have treated his Motion which was consented to by the Duke defendants as a stipulation of dismissal under Rule 41(a)(1)(ii) rather than as a motion for dismissal under Rule 41(a)(2) as Petitioner himself had presented such. This position was never taken by Petitioner before the District Court. Indeed, Peti-

tioner sought and obtained reconsideration of his motion before the District Court, and at no time prior to taking appeal did he ever, to these Respondents' knowledge, assert that his Rule 41(a)(2) motion was anything other than a motion seeking an Order from the Court. Secondly, Petitioner argued before the Court of Appeals for the Fourth Circuit that the District Court abused its discretion in failing to allow Petitioner's Rule 41(a)(2) motion for voluntary dismissal. (See Appendix A appended hereto.)

The Court of Appeals addressed Petitioner's first argument by observing that - while it may have been permissible for the District Court to treat the Rule 41(a)(2) motion as a Rule 41(a)(1)(ii) stipulation - the Court was not obliged to do so. (Appendix A to Petition for Writ of Certiorari at page 56.) Petitioner's second

argument - that the District Court abused its discretion in denying the Rule 41(a)(2) motion - was considered and rejected by the Court of Appeals. (Appendix A to Petition for Writ of Certiorari at pages 56-63.)

From these rulings of the Court of Appeals Petitioner distills and seeks to advance before this Court the argument that the Fourth Circuit Court of Appeals has adopted a reading of Rule 41(a) that conflicts with decisions of other federal courts of appeal. The argument is premised on the contention that the Fourth Circuit has followed, sub silentio, the decision of the Second Circuit in Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953), cert. denied, 345 U.S. 964 (1953), and that the Harvey Aluminum case conflicts with a decision in the Third Circuit (citing Young v. Wilky Carrier Corp., 150 F.2d 764 (3d Cir. 1945), cert.

denied, 326 U.S. 786.)

Based upon this perceived conflict between two federal courts of appeals, Petitioner then argues that the Supreme Court of the United States must decide the question whether Rule 41(a) permits a court to order dismissal of fewer than all defendants to a multi-party action at the instance of the plaintiff. (Petition for Writ of Certiorari at i).

A careful reading of the unpublished opinion of the Court of Appeals in this case reveals, however, that the court did not decide the question presented by the Petition. Without attempting to analyse the issue of whether Rule 41(a) permits a plaintiff to dismiss some but not all defendants, the Court of Appeals assumed, arguendo, that such action would be permissible but found that the District Court did not abuse its discretion in failing to

grant Petitioner's motion in the present case. (Appendix A to Petition for Writ of Certiorari at pages 56-63).

Petitioner's contention that the Fourth Circuit has now adopted the Harvey Aluminum rule is without foundation in the opinion rendered by the Court of Appeals. Nowhere is there any reference to the differing opinions among the circuits with respect to the meaning of the word "action" as such appears in Rule 41(a) nor did the Court of Appeals indicate that it deemed it necessary in this case to resolve the question for the Fourth Circuit. The issue simply was never addressed by the Court of Appeals and a resolution of the issue was unnecessary to the Court's decision.

Respondents concede that there is a dichotomy in the decisional law with respect to the question of whether the dismissal of an "action" under Rule 41(a) may

be limited to claims or causes of action against one of several defendants. It is respectfully submitted, however, that this question was not decided by the Court of Appeals for the Fourth Circuit in the present appeal, and therefore it is neither necessary nor appropriate for the Supreme Court to resolve the issue through review of the instant case. Adickes v. Kress & Co., 398 U.S. 144 (1970); Lawn v. United States, 355 U.S. 339 (1958); Husty v. United States, 282 U.S. 694 (1931); Duigan v. United States, 274 U.S. 195 (1927).

B. The decision of the Fourth Circuit Court of Appeals to the effect that a District Court is not obliged to treat a Rule 41(a)(2) motion for voluntary dismissal as a Rule 41(a)(1)(ii) stipulation for dismissal is not in conflict with a decision of another federal court of appeals on the same matter.

Petitioner argues in his Petition to the Supreme Court of the United States that the District Court "vetoed" a stipulation for dismissal between Petitioner and the Duke defendants in failing to treat Petitioner's Rule 41(a)(2) Motion for voluntary dismissal as a stipulation of dismissal under Rule 41(a)(1)(ii). Petitioner further argues that the Court of Appeals' failure to reverse the District Court on this issue constitutes a decision which conflicts with decisions in other federal circuits. (Petition for Writ of Certiorari at pages 25-33.)

Petitioner urges that the Supreme Court must decide in this case whether several defendants - but not all defendants - may be dismissed from a multi-party lawsuit on the basis of a stipulation between the plaintiff and those defendants whose dismissal is sought without the

active consent of the additional parties. Yet the facts of the present case and the issues presented to the Court of Appeals do not appear to frame this question for review.

Again, turning to the "Issues Presented" by Petitioner to the Court of Appeals, Petitioner posed the question whether the motion to dismiss and the Duke defendants' consent thereto resulted in an automatic dismissal effective without Order of the court. (See Appendix A appended hereto). In response to this question, the Court of Appeals held that while a court may have the authority under the Rules of Civil Procedure to "unmask" a stipulation "masquerading as a Rule 41(a)(2) motion," it is by no means obliged to do so. (Appendix A to Petition for Writ of Certiorari at page 56.) Indeed, at no time prior to the taking of appeal did the Plaintiff-

Petitioner ever request the District Court to treat the motion as a stipulation.

Thus the question of whether a District Court may "veto" a Rule 41(a) (1)(ii) stipulation of dismissal of less than all parties is not presented for review on the record of this case. The question was not resolved by the Court of Appeals and indeed it was unnecessary that the Court of Appeals do so.

The contention of Petitioner that the Court of Appeals for the Fourth Circuit decided that a District Court may "veto" such a stipulation of dismissal and that the decision is thus in conflict with decisions of other federal courts of appeal is without merit, such having no support in the record on appeal or in the opinion of the Court of Appeals. Because the question was neither presented to nor decided by the Court of Appeals below, it is neither

necessary nor appropriate that the Supreme Court address the question by way of review on writ of certiorari. See, e.g., Adickes v. Kress & Co., 398 U.S. 144 (1970) supra, and cases cited therein.

2. The Court of Appeals did not depart from the accepted and usual course of judicial proceedings in affirming the District Court's allowance of the Duke defendants' Motion for involuntary dismissal under Rule 41(b).

Having failed to prevail in the Court of Appeals upon the argument that the District Court abused its discretion in allowing a motion for involuntary dismissal under Rule 41(b) (Appendix A appended hereto), Petitioner now asserts that the District Court deviated from the normal course of judicial proceedings in allowing the motion and that this departure was sanctioned by the Court of Appeals. (Petition for Writ of Certiorari at pages 34-39.)

It is difficult for Respondents to

grasp the basis upon which the Supreme Court is asked to exercise its supervisory powers over the lower federal courts for the purpose of reversing the District Court and the Court of Appeals on the record now before the Court. The procedure followed in this case was in accordance with the Rules of Civil Procedure. Respondents' Motion [for an involuntary dismissal with prejudice] was based upon Petitioner's representation, under oath, that "Plaintiff has presently no testimony prepared to present against the Duke Defendants", that "Plaintiff is not at this time desirous of presenting a case against the Duke Defendants", and that "We [Plaintiff] are in the anomalous position of having defendants against whom we, at this time, do not wish to litigate in the case". (Appendices B and C appended hereto.) The Motion under Rule 41(b) was made in open Court at the

time the case was called for commencement of jury selection - such being the day after receipt by Respondents of the representation that Plaintiff did not wish to present a case against the Duke defendants (belatedly filed with the Court by way of Plaintiff's Answers to Interrogatories) and a substantial period of time after the District Court had denied Plaintiff's Motion for voluntary dismissal under Rule 41(a)(2). Respondents can only submit that the procedure followed by Respondents in presenting the Motion for involuntary dismissal was in all respects correct and proper and did not in any manner depart from the accepted and usual course of judicial proceedings as established by the Rules of Civil Procedure.

As the Motion for involuntary dismissal was properly brought before the District Court, it was in accordance with

the accepted and usual course of judicial proceedings that the District Court should issue a ruling upon the Motion after hearing argument of counsel. This the Court did. (Appendix B appended hereto.) Upon being requested by the District Court to respond to the Duke Defendants' Motion and the argument of their counsel in support thereof, counsel for Plaintiff stated that

> the Plaintiff feels that the defense [defendants'] position of [on] the [Rule] 41(b) motion is totally accurate if you deny a [Rule] 41(a)(2) motion which you've done. . . . I see no alternative for the Court but to dismiss involuntarily. . . . [O]ur position on the record, obviously, cannot be recanted and Duke wins on this motion as I see it. . . . [T]he Plaintiff objects to Duke getting out with prejudice in the final analysis. We don't think that's what should be done. And I'm going to state on the record before your Honor now the 41(a)(2) motion having been denied and [in] the interest [of] having our record, we have nothing to offer to counter their motion for involuntary dismissal.

(Appendix B appended hereto.)

It cannot be gainsaid that the federal trial court has the authority to dismiss a plaintiff's action with prejudice because of his failure to prosecute. Link v. Wabash R. Co., 370 U.S. 626 (1972). What constitutes a "failure to prosecute" depends on the facts of the particular case. The issue presented upon allowance of such a Motion is whether the Court abused its discretion. Id. This question has been presented to the Court of Appeals for the Fourth Circuit based on the circumstances of the present case and answered by that Court in the negative. (Appendix A to Petition for Writ of Certiorari at pages 61-62.)

The Motion for involuntary dismissal having been properly brought before the District Court and ruled upon by that Court, and no abuse of discretion having

been found in the Court's ruling thereon by the Court of Appeals for the Fourth Circuit, the record before the Supreme Court is barren of any ground to substantiate the contention that the Court of Appeals departed from the accepted and usual course of judicial proceedings in deciding this appeal. It is thus submitted that Petitioner's argument affords no basis for the exercise of the supervisory powers of the Supreme Court by way of writ of certiorari to the Fourth Circuit Court of Appeals.

3. Review by writ of certiorari is unwarranted with respect to the issues presented under Rule 41 of the Rules of Civil Procedure upon the additional grounds that the questions presented by the Petition were correctly analysed and decided by the Court of Appeals, that the questions of federal law are not so important as to require resolution by the Supreme Court, and that the unusual factual background of this case makes it unlikely that similar issues will recur.

A. The questions presented were correctly analysed and decided by the Court of Appeals.

The issues raised in the Court of Appeals with respect to the District Court's decisions on the Rule 41(a)(2) and 41(b) Motions were threefold: firstly, was the Court obliged to treat the Rule 41(a)(2) Motion and the Duke Defendants' consent thereto as a stipulation for dismissal under Rule 41(a)(1)(ii); secondly, if not, did the Court abuse its discretion in denying the Rule 41(a)(2) Motion; and thirdly, if not, did the Court abuse its discretion in allowing the Rule 41(b) Motion for involuntary dismissal? (See Appendix A appended hereto and Appendix A to Petition for Writ of Certiorari at pages 50-63 and pages 71-73.) It is not open to serious quarrel, Respondents contend, that the Court of Appeals properly recognized the issues and applied the appropriate standard of review. Link v. Wabash R. Co., supra, 370 U.S. 626 (1962); Blue Mountain

Construction Co. v. Werner, 270 F.2d 305 (9th cir. 1959), cert. denied 361 U.S. 931 (1960). The decisions of the District Court upon which review is sought in this case were (and are) matters within the sound discretion of the trial court. This record simply presents no support that the District Court abused its discretion in reaching the decisions it rendered.

B. The questions of federal law properly presented in the present case are not so important as to require resolution by the Supreme Court of the United States.

As Petitioner recognized in the Court of Appeals, the questions appropriately raised for review by denial of Plaintiff's Rule 41(a)(2) Motion and the allowance of the Duke Defendants' Rule 41(b) Motion involve the tandem inquiry of whether the District Court abused its discretion in refusing to dismiss without prejudice and

then dismissing with prejudice. The exercise of trial court discretion within the limits established by this Court is fundamental to the effective operation of the federal judicial system at the District Court level. To seek review by the court of last resort upon every discretionary ruling of a federal trial judge is, however, to frustrate the purpose and meaning of trial court discretion. The proper exercise of discretion is a question previously addressed by this Court and the guidelines for such exercise are well established. Link v. Wabash R. Co., supra. Once such guidelines have been established, it should not be expected that the Supreme Court will review each and every discretionary ruling of the trial courts. The proper exercise of trial court discretion is important, of course, but the proceedings below in the case at bar do not re-

flect such an important question of federal law as to require review by the Supreme Court in this case.

C. The unusual factual background of this case makes it unlikely that similar situations will recur.

Respondents respectfully submit that the circumstances of the present case are so unusual and unlikely to recur that review by the Supreme Court would not provide appreciable guidance to the lower courts in future cases.

The Duke Defendants consented to the terms of Plaintiff's Motion for voluntary dismissal at a time when the only available alternative appeared to be trial on the merits. Only after the Motion for voluntary dismissal was denied did Plaintiff (in response to the Duke Defendants' written Interrogatories) concede by verified statement (verified Answers To Interrogatories)

that Plaintiff was without any evidence to present at trial as against the Duke Defendants. Once this admission had been made on the record, the Duke Defendants on the day following - being the day on which jury selection was to begin - moved orally for an involuntary dismissal under Rule 41(b).

A decision of the Supreme Court under this unusual fact pattern - whether affirming or reversing the decision of the Fourth Circuit Court of Appeals as set forth in its unpublished decision - would be of limited benefit to the lower federal courts. Nor is it necessary that the Supreme Court seek to modify or explain the decisions below in order to avoid the possibility that the decisions of the District Court and the Court of Appeals will establish a precedent in the Fourth Circuit as neither decision has been published.

For the foregoing reasons, it is respectfully submitted that special circumstances do not exist which would make it appropriate for a Writ of Certiorari to be issued by the Supreme Court of the United States in the case at bar.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED WITH RESPECT TO THE ISSUE ARISING UNDER RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

1. The Fourth Circuit Court of Appeals gave full consideration to this issue and its decision is legally sound.

As a fourth issue, petitioner argues that the Fourth Circuit Court of Appeals erred in affirming the trial court's deletion of an informed consent portion of the charge to the jury. Respondents submit that the Fourth Circuit decision was correct, and therefore certiorari should be denied.

Rule 26.06 of the local rules of practice and procedure of the United States

District Court for the Eastern District of North Carolina requires that counsel file requests for jury instructions with the Clerk in all jury cases. Rule 51 of the Federal Rules of Civil Procedure also allows the parties to file requests for jury instructions. Pursuant to these rules, petitioner and respondents filed proposed jury instructions with the court, and no informed consent instruction was requested by any party.

The court then prepared its proposed instructions and distributed copies to the attorneys. The court included in its charge the North Carolina pattern jury instructions covering the issue of informed consent, which instructions are cast in terms of obtaining consent to an operative procedure or affirmative treatment.

Respondents objected to that portion of the charge related to informed consent,

arguing that petitioner failed to offer any evidence that the defendant-doctors had rendered a treatment or an operation for which they failed to obtain the petitioner's informed consent. Therefore, respondents argued that the language of the pattern jury instructions on informed consent did not fit the facts of the case and would have been misleading and confusing to the jury. The Court agreed with the respondents' argument and deleted the charge. (See Appendix D appended hereto)

The portion of the charge that the court deleted dealt with a physician's duty to obtain the patient's informed consent to treatment or operation. However, it was petitioner's theory during the trial that the defendant-doctors were negligent in failing to warn the patient and his family of the risks inherent in their decisions to delay treatment and transfer to Duke Medi-

cal Center. Clearly, the petitioner's theory did not fit the pattern jury instructions on obtaining informed consent to operation or treatment. If a special failure to warn instruction was warranted, petitioner had a duty to propose it. Petitioner failed to do so in advance of the charge and failed to offer any additional instructions to the court at the end of the court's charge to the jury. Consequently, the Fourth Circuit Court of Appeals correctly allowed the charge to stand as given, and certiorari should not be granted.

2. The issue is unlikely to recur and is too narrow to warrant review by this Court on certiorari.

The issue raised by petitioner in his fourth reason for certiorari turns on the particular facts of this case alone and is of interest only to the parties involved. The appellate court's decision turned solely upon an analysis of the particular

facts involved and will affect few, if any, other litigants, particularly since the opinion was not published. "Certiorari is granted only in cases involving principles, the settlement of which are of importance to the public as distinguished from the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the courts of appeals." NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 502 (1951). As stated in United States v. Johnston, the Supreme Court "...does not grant a certiorari to review evidence and discuss specific facts." 268 U.S. 220, 227 (1925).

Petitioner is merely asking this Court to make a second review of the trial record to see if it will do what the Fourth Circuit Court of Appeals would not. The rulings of the Fourth Circuit should be and are entitled to great weight, particularly

in view of the fact that the petitioner has failed to cite any legal authority contrary to the appellate court's ruling.

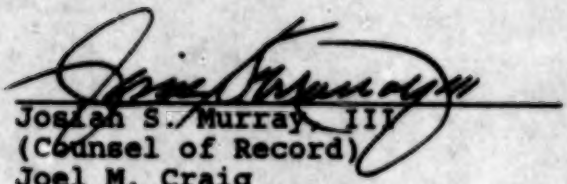
In conclusion, this issue has no overall national importance, and certainly does not involve any conflict of opinion or authority between appellate courts. The Fourth Circuit's opinion will have no impact outside the limits of this case. Therefore, certiorari should be denied.

* * *

CONCLUSION

For the reasons and upon the authorities herein stated, Respondents respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted this the ____ day of October, 1982.



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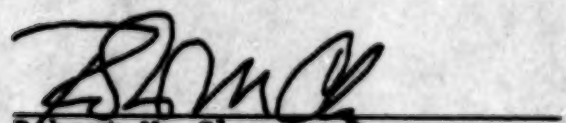

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TABLE OF APPENDICES

APPENDIX A: Petitioner's List of Issues Presented on Appeal to the Court of Appeals for the Fourth Circuit

APPENDIX B: Excerpt from hearings before the Honorable W. Earl Britt, United States District Court Judge, Eastern District of North Carolina, on Duke Defendants' (Respondents herein) Motion for Involuntary Dismissal

APPENDIX C: Plaintiff's Answers to Interrogatories propounded by the Duke Defendants (Respondents herein)

APPENDIX D: Bench conference of May 13, 1981, before the Honorable W. Earl Britt, United States District Court Judge, regarding the charge to the Jury.

APPENDIX E: Rule 26.06, Rules of Practice and Procedure in the United States District Court for the Eastern District of North Carolina.

APPENDIX A

STATEMENT OF ISSUES PRESENTED BY PETITIONER ON APPEAL TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

1. When the plaintiff filed a request for a voluntary dismissal without prejudice and a consent to that dismissal by defendants Duke University, David F. Paulson and Michael J. Moran, was the request for dismissal automatically effective as a notice of dismissal without Order of Court under Rule 41(a)(1) despite the fact that the request was framed as a Rule 41(a)(2) motion?

2. Even if the plaintiff did not invoke a Rule 41(a)(1)(ii) dismissal of right when he filed his motion for dismissal, was it an abuse of dis-

cretion and error for the Court to deny plaintiff's 41(a)(2) motion for a voluntary dismissal without prejudice as to defendants Duke University, David F. Paulson and Michael J. Moran when these defendants consented to such dismissal, the remaining defendants stated that they had no objection to the dismissal and no cross-claims had been filed between the defendants?

3. Even if the plaintiff did not invoke a stipulation of dismissal under Rule 41(a)(1)(ii) and even if the Court did not abuse its discretion in refusing to grant plaintiff's Rule 41(a)(2) motion to dismiss the Duke defendants without prejudice, did the Court abuse its discretion and commit error in granting the

Duke defendants' subsequent Rule 41(b) motion for an involuntary dismissal with prejudice?

4. Was it error for the Court to exclude the plaintiff-incompetent from the further proceedings at the trial of this action?

5. Where the Strawcutter group defendants acknowledged that they had not given the plaintiff or his family any warnings of the hazards of the delay in treatment resulting from the transfer of the plaintiff from their care at Southeastern General Hospital to Duke Hospital, when there was substantial evidence at the trial of such hazards caused by such a delay in transferring the patient to another institution and where the plaintiff requested the Court to submit an instruction to

the jury on the duty of the Straw-cutter defendants to warn the plaintiff or his family of such hazards, was it error for the Court to refuse to include in its charge an instruction of negligence to fail to warn the plaintiff or his family of the hazards in delay of treatment resulting from a transfer from one medical institution to another?

APPENDIX B

EXCERPT FROM HEARINGS BEFORE BRITT, J., U.S. DISTRICT COURT, EASTERN DISTRICT OF NORTH CAROLINA, APRIL 7, 1981.

NOTE: Language which appears hereafter in parentheses reflects language taken verbatim from the Court transcript of the subject hearing; language appearing in brackets has been added by counsel to Respondents to reflect what Respondents submit would be a proper transcription of the oral statements made in open Court or to supply proper grammatical context; no change of substantive content, however, has been made.

All right, I've got a Motion by Duke Defendants to dismiss for failure to answer an interrogatory.

Mr. Murray: Yes, Your Honor. We would like to be heard on that. It does, in fact, trigger two oral motions and they are oral and not written for reason of the timing of the Answers to Interrogatories which, I understand, were filed by Plaintiffs either yesterday or today.

The pertinent chronology is as follows, Your Honor. On the day of September 14, 1979, the Duke Defendants propounded to the Plaintiffs a very extensive first set of written interrogatories. To make short of long, the thrust of those interrogatories sought to focus upon what (evidential) [evidentiary] material the Plaintiffs have, if any, to support any contention of negligence on the part of the Duke Defendants. Those written interrogatories went without answer.

On June 23, 1980, a second set of written interrogatories were propounded by the Duke Defendants to the Plaintiff, the essence of which was two questions. (The) [Q]uestion number 2 would not be reached if question number 1 was answered negatively. For that purpose, I shall read simply one question. That was this,

to wit: "Is there any person that Plaintiff expects to call as an expert witness at the trial (and) [in] the prosecution of the case (that's) [as] to Duke University, David F. Paulson, Michael J. Moran and Lewis Gonzales Servo.[?]"

In response to that, apparently either yesterday or today, we were handed a copy of what is denoted as Plaintiff's Answers to the Interrogatories of the Duke Defendants. Without reading that verbatim, I do focus upon three points which have been set forth in these written answers, these having been verified, I believe, by the guardian for the incompetent Plaintiff. At the top of Page 2, "Plaintiff has presently no testimony prepared to present against the Duke Defendants."

In the next paragraph on Page 2, "Plaintiff is not at this time desirous

of presenting a case against the Duke Defendants." In the last paragraph, "We are in the anomalous position of having Defendants against whom we at this time do not wish to litigate in the case."

We had filed a motion to dismiss (a) [under] Rule 37 which is addressed to compelling discovery, but now in view of these answers, a form of answers, which (has) [have] been filed with the Court (and very fine) [in verified] form, we would like to make a[n] oral motion for an involuntary dismissal under Rule 41, subsection (b) of the Federal Rules of Civil Procedure.

[Under] Rule 41, Subsection (b), the involuntary dismissal section, most of the case law develops under the second sentence and [the language of the rule which appears] thereafter which is addressed to a non-jury trial and the point

of the trial at which the Plaintiff rest[s] its case. However, there are a number of cases - reported cases - [in] this jurisdiction as well as [in] other jurisdictions (under) [which are addressed to] the first sentence of 41(b). It reads as follows, "Involuntary Dismissal. For failure of the Plaintiff to prosecute or to comply with these rules or any order of the Court, a Defendant may move for dismissal (or) [of] an action [or] of any claim against him." The annotations to that particular rule reads," The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or comply with the Rules (to) [or] any order of court, and the general provisions of the last sentence remain applicable in jury as well as non-jury cases."

We argue at this time that the answers filed yesterday would qualify the Duke Defendants to move at this time for an involuntary dismissal of the case against them for failure to prosecute. As set forth in length, in the Wright and Miller work on civil procedure, Federal Practice & Procedure which I believe is in your Honor's library, Section 2370, Footnote 12, sets forth the many reported cases under failure to prosecute. It can, in fact, even come up at the pre-trial conference stage.

There is a Fourth Circuit decision on it, [Krodel vs. Houghtoling], which I take it is in this jurisdiction as the Fourth Circuit, 1972, 468 F2d 887, certiorari was denied by the U.S. Supreme Court, where the gist of (it) [the decision] is: where the Plaintiff had ample opportunity to develop evidence in sup-

port of his action for malicious interference with contract rights, but neither interviewed nor subpoenaed witnesses (his) [whose] whereabouts he knew, dismissal [of the] action for lack of prosecution was within the trial court's sound judicial (expression) [discretion].

Whether it develops under [a] failure to prosecute or a breach of this Court's rules, we would say an involuntary dismissal would be apt in this case in any event. Under your local rule, I believe, 25.03, Subsection (f), it (was) [is] incumbent upon the Plaintiffs not only to give us the names and addresses of witnesses they might use against us, but [also to give us] a brief narrative of anything they would say to assign to the Defendants any type of negligence for which they had to account. No such synopsis (was) [has been] given.

Your Honor, again in the federal procedure in Moore's Federal Practice, the same subject is treated under Section 41.11, and it appears at page 41-130 of Volume V, where an involuntary dismissal is properly entered (where) by statement on the day of the - on the day set for trial, [and] the Plaintiff does not wish to proceed with the suit - (or) [such will] qualify the moving Defendants for an involuntary dismissal. Not only do we have a statement, we have it set forth (and) [in] verified [and] in written form and signed not only by the counsel for the Plaintiffs, but verified by the Plaintiff himself, that they do not desire to proceed against Duke.

We are put in the very unhappy position of having to prepare for a lengthy and vexatious trial when the Plaintiffs in verified form have said

that they have no witnesses they intend to put on [to prove] a case (with) against Duke and do not desire to proceed against Duke.

That is the first of the two motions and it can be reduced to written form and filed with the Court. We wanted to argue it at length in definitive fashion orally and it has not been put in writing because we only had (this one) [our interrogatories] answered yesterday.

The Court: Let me see that thing.

Mr. Murray: I have the interrogatory number 1 and I have checked off the two places. I will defer continuing argument until after you have had an opportunity to read that.

(Document handed to the Court.)

The Court: All right, you may continue.

Mr. Murray: As I have mentioned, Your Honor, the material in your library sets forth a number of cases where the Court has entered involuntary dismissal under 41(b) in (those) [these] circumstances. There is also case law that will allow for such an involuntary dismissal where a party has failed to list the material required to be included in the pretrial order, such as what they are to say - the witnesses.

The second motion we would like to make orally is one for summary judgment under Rule 56. At least four things need to be addressed. One, the timing of the motion. Number Two, whether such a motion can be made orally. Number Three, procedural requirements, and Number Four, the supporting material.

As far as the timing, the language of Rule 56 states in pertinent part as follows--

The Court: (Interposing) Let me hear from Plaintiff on your first motion.

Mr. Rountree: Judge, at this time, the Plaintiff feels that the (defense) [defendants'] position (of) [on the] 41(b) motion is totally accurate if you deny a 41(a)(2) motion which you've done. And the answers to interrogatories having been filed, and having been very carefully considered by the Plaintiff who did not have evidence from medical experts who have given us permission to use their names, and indicated (unqualifiably) [unqualifiedly] that they were prepared to come testify, I see no alternative for the Court but to dismiss involuntarily in light of the fact that the Duke [Defendants] (is) [are] in the case notwithstanding the efforts of the Plaintiff and Duke to get Duke out, reserving our right to proceed against them to which they consented.

If we can't do that, then our position on the record, obviously, cannot be recanted and Duke wins on this motion as I see it. (Now) [Our] urologists have been the ones objecting to (getting) [letting] Duke out, probably [because] they have more knowledge about it than I do.

Mr. [Clay]: Excuse me, sir. Your Honor, we're not involved in this motion in any way. I just -

The Court: (Interposing) We have urologists getting out.

Mr. Clay: Well I can't let that pass. We have never objected to Duke getting out. We have simply refused to--

The Court: (Interposing) Gentlemen, I am completely aware of the whole gambit of what's happening on these motions. The Court takes full responsibility for it[s] rulings on everything that's happening.

Anything further, gentlemen?

Mr. Rountree: Yes, sir. Only the - obviously, the Plaintiff objects to Duke getting out with prejudice in the final analysis. We don't think that's what should be done. And I'm going to state on the record before Your Honor now the 41(a)(2) motion having been denied and [in] the interest [of] having our record, we have nothing to offer to counter their motion for involuntary dismissal.

The Court: Motion of the Duke Defendants under Rule 41(b)(2) is allowed.

Mr. Murray: The other motion is moot.

The Court: Reduce your motion to writing and file it with the Court, please.

Mr. Murray: Thank you, Your Honor.

Could I verify that (that has been filed with) [the original of the] answers

[to interrogatories have been filed] and can I conform my copy?

Mr. Rountree: They were filed yesterday.

Mr. Murray: Can I conform my verification with that?

APPENDIX C

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES OF DEFENDANTS DUKE UNIVERSITY MEDICAL CENTER, DUKE HOSPITAL, DAVID F. PAULSON, AND MICHAEL J. MORAN, FILED APRIL 6, 1981

1.

Plaintiff, through his counsel, has consulted with critical care physicians at Massachusetts General Hospital and elsewhere concerning the care that plaintiff's incompetent received at Duke University. The opinions of those experts have to date been expressed in entirely oral conferences, and they have prepared no written reports.

Presently plaintiff is not in a financial condition to adduce written opinions or testimony from these experts and for this reason had heretofore moved to dismiss his action against Duke University, Dr. David F. Paulson and Dr.

Michael J. Moran, to which these defendants had consented.

Without more time and funds at his disposal plaintiff is unable to put on a case against these defendants and is still desirous of dismissing, without prejudice, his action against these defendants, with leave to refile the action in the State Court if, after the litigation pending against other defendants, he deems it in the best interest of plaintiff's incompetent to do so, a decision he cannot make until that litigation is completed.

Being presently without the necessary funds or time to prepare his case against Duke University, and Drs. Paulson and Moran, and unsure as to whether or not, after trying his case against Defendants Strawcutter, Leininger and Burleson, he would see fit to litigate

further against Duke and Drs. Paulson and Moran, plaintiff has presently no testimony prepared to present against the Duke Defendants.

The nature of the claims against the Duke defendants would differ in several material aspects from the nature of the claims against Defendants Strawcutter, Burleson and Leininger as would the proof of those claims and would require the expert testimony of witnesses with different training, experience and expertise than those witnesses whom plaintiff plans to present in proof of his claim against Defendants Strawcutter, Burleson and Leininger.

While plaintiff has consulted informally with such experts, he has no affidavits and no written reports from these experts, all of which is material he expected to prepare in due course

provided he elected to pursue the claims against Duke defendants after their dismissal without prejudice, and which he is not at this time able financially or time wise to adduce while preparing to litigate his case against Defendants Strawcutter, Burleson and Leininger.

In the event that he were to be permitted to dismiss his present action against the Duke defendants and thereafter, indeed, did elect to refile those claims, he would at that time first be able to decide which experts he would use to testify in that action. As yet he has made no such decision either as to whether or not to so litigate and, if he did litigate, which of the numerous available experts he would seek to retain to testify in the cause.

For all of these reasons, plaintiff is not presently able to supply, except

as here set forth, the information requested in this interrogatory. Plaintiff is not, at this time, desirous of presenting a case against the Duke defendants, which is why he sought the dismissal to which the Duke defendants consented, and Duke University, Dr. David F. Paulson and Dr. Michael J. Moran are at this time defendants in this case despite plaintiff's sincere and sustained efforts to dismiss the actions as to them, all as set forth in his motion to dismiss and his motion that the Court reconsider its ruling denying the said dismissal.

We are in the anomalous position of having defendants against whom we, at this time, do not wish to litigate in the case despite our best efforts to have them dismissed from the case and despite their consent to the said dismissal.

We know no other information in this regard which we can furnish you at this time.

2.

See answer to interrogatory number 1.

3.

See answer to interrogatory number 1.

4.

See answer to interrogatory number 1.

5.

See answer to interrogatory number 1.

6.

See answer to interrogatory number 1.

7.

See answer to interrogatory number 1.

8.

See answer to interrogatory number 1.

9.

See answer to interrogatory number 1.

10.

See answer to interrogatory number 1.

11.

See answer to interrogatory number 1.

12.

See answer to interrogatory number 1.

13.

See answer to interrogatory number 1.

14.

See answer to interrogatory number 1.

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See answer to interrogatory number 1.

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See answer to interrogatory number 1.

17.

See answer to interrogatory number 1.

18.

See answer to interrogatory number 1.

19.

See answer to interrogatory number 1.

20.

See answer to interrogatory number 1.

21.

See answer to interrogatory number 1.

See answer to interrogatory number 1.

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BY:/s/ George Rountree, III
GEORGE ROUNTREE, III
(Attorneys for
Plaintiff)

****

HENRY CYLDE MORRELL, first being duly sworn, deposes and says as follows:

That he is the plaintiff in the above entitled matter and has read the foregoing Answers to Interrogatories and

knows the contents thereof; that the same are true to his own knowledge save and except those things stated on information and belief, and as to those he believes it to be true.

This the 6th day of April, 1981.

/s/ Henry Clyde Morrell
HENRY CLYDE MORRELL

Sworn to and subscribed to before me, this 6th day of April, 1981.

/s/
NOTARY PUBLIC

My commission expires: 3-11-86

(SEAL/STAMP)

APPENDIX D

BENCH CONFERENCE OF MAY 13, 1981,
REGARDING THE CHARGE TO THE JURY,
BEFORE THE HONORABLE W. EARL BRITT,
UNITED STATES DISTRICT COURT JUDGE

Mr. McCain: I take it that you took out the charge of failure to inform?

The Court: In the form of consent, yes.

Mr. McCain: Can the record so show that we requested that as a charge?

The Court: Yes, sir. Now, let me say this, that federal rules require great specificity and you may do whatever you want to to try to protect yourself but they are very very tough on that. You have to be quite specific. Now, it may be that you can do it by reference and request the form of consent charge as set forth in the North Carolina pattern jury instructions. That would satisfy the rule. I'm not saying that it will or

won't. I'm just telling you that you've got to be very specific.

Mr. McCain: Can I refer my reference to your earlier suggested charge?

The Court: That doesn't appear in the record is my problem. I'm trying to help you to do anything you can to protect yourself because I've only been on the job about a year and all I know is from reading the decisions. They are mighty tough, but you have got to be very specific and I will allow you, if I'm permitted, to supplement your request for the written part.

Mr. McCain: It would just be your earlier suggested charge.

The Court: Well, you can get those pages and have Susan put them in the record. That will be requested by you and let the record reflect that the court earlier had that in its charge and upon reflection

felt that it was no issue apprising as to formal consent and a charge on that would be inappropriate under the circumstances.

Mr. McCain: Thank you very much.

APPENDIX E
RULES OF PRACTICE AND PROCEDURE IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

26.06: Jury Cases. In all jury cases, counsel shall file with the clerk:

(a) a list of any voir dire questions as required by Local Rule 6.02;

(b) requests for jury instructions with citations to supporting authorities; and

(c) proposed issues to be submitted to the jury.

CERTIFICATE OF SERVICE

The undersigned herewith certifies that he has this day caused the foregoing Respondents' Brief to Plaintiff's Petition for a Writ of Certiorari to be served upon the attorneys of record to Plaintiff-Petitioner by causing (3) copies to be deposited in an official depository under the exclusive care and custody of the United States Postal Service with first-class postage fully prepaid, properly addressed to each of said attorneys at his last-known mailing address, they being:

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This the 22nd day of October 1982.

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